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CASES:

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MISCELLANEOUS:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 401

CITY BANK FARMERS TRUST COMPANY, as ancillary executor of the last will and testament of Edwin Prestage, deceased, and as trustee under an agreement made by said deceased dated July 31, 1939, *Petitioner*

v.

WILLIAM J. PEDRICK, United States Collector of Internal Revenue for the Second District of New York

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 69-80) is reported in 69 F. Supp. 517. The opinion of the Court of Appeals (R. 91-95) is reported in 168 F. 2d 618.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1948. (R. 96-97.) The petition for rehearing (R. 98-105) was denied on August 13, 1948 (R. 106-108). A petition for a writ of certiorari was filed November 8, 1948. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

Whether a bank deposit of $80,377.02 was properly included within the estate of a deceased nonresident alien for purposes of the federal estate tax, or whether it should have been excluded under Section 863(b) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra,* pp. 10-12.

STATEMENT

This is an action for the recovery of estate taxes paid. (R. 2-32.) The facts were largely stipulated. (R. 37-43, 70.) The District Court made special findings of fact (R. 70-71) and concluded that the taxpayer was entitled to judgment (R. 80). Judgment was accordingly entered for the taxpayer in the principal amount of $8,499.46 plus interest and costs. (R. 84-85) The Collector appealed to the Court of Appeals for the Second Circuit which reversed the judgment and dismissed the complaint.

(R. 95, 96-97) The taxpayer's petition for rehearing was denied. (R. 98-108)

The findings of the District Court (R. 70-71, 73), supplemented by the stipulation (R. 37-43), may be summarized as follows:

Edwin Prestage (hereinafter called the decedent) died October 11, 1940, a British subject, residing and domiciled in England. He was not engaged in business in the United States. (R. 70.)

His will, dated March 21, 1938, was duly probated on April 17, 1941, in England, and was thereafter recorded in the Surrogate's Court, New York County, and ancillary letters testamentary were duly issued by that court to the taxpayer, which duly qualified thereunder and has ever since continued as ancillary executor. (R. 70.)

The bank account here involved had been maintained in his own name by the decedent in National City Bank of New York prior to July 31, 1939. On that day he created an *inter-vivos* trust, naming and designating the taxpayer as sole trustee. (R. 70.)

By the deed of trust, the decedent conveyed to taxpayer as sole trustee some securities and $79,000 then on deposit in his account in the National City Bank of New York. (R. 19, 70.) This deed provided that the trustee should collect the income from the property and apply it to the use of the decedent during his life, and after his death to that of his wife; and upon the death of both the trustee

was to transfer the principal as the survivor might appoint by will, with remainders over in default of appointment. (R. 11-12, 70-71, 73.) The trust deed gave the trustee various rights in the management of the trust fund (subject to the supervision of the settlor) (R. 12-14, 70-73); and in Article Fifth (R. 15-16) the settlor reserved to himself—

> the right at any time and from time to time, with the consent in writing of the Trustee (but not otherwise) * * * to amend or revoke this instrument or the trusts hereby created, either in whole or in part.

In the event of any such revocation the principal was to be transferred back to the settlor. (R. 16.) After his death a similar power was reserved to his wife, and then the deed went on as follows (R. 16):

> In giving or withholding its consent to any such amendment, revocation or termination, the Trustee shall consider only the interests of the Settlor or his said wife who is making such amendment, revocation or termination, as the case may be, and not those of any other person interested in the trust hereby created, except that in its own individual interests the Trustee may withhold its consent to any proposed amendment which in its judgment would substantially increase its duties or responsibilities.

Upon receipt by the trustee of the sum of $79,000 referred to above, the trustee deposited it with

itself individually, in an account designated "City Bank Farmers Trust Company, Trustee Edwin Prestage u/a 7/31/39 with Edwin Prestage—No. 20050," and that sum remained so deposited continuously until and including the date of the death of the decedent. (R. 70-71.)

Between July 31, 1939, and the date of death, items of income from the securities, totaling $1,377.02, were likewise so deposited. (R. 71.)

The Commissioner included the bank deposit in the decedent's gross estate for purposes of the federal estate tax. (R. 41.) The taxpayer paid the tax (R. 41) and thereafter filed a claim for refund which was disallowed (R. 42). Thereafter the taxpayer brought this action. (R. 2-32.)

ARGUMENT

The instant case presents only the question whether the decedent's interest in the trust should have been excluded from his estate under Section 863(b) of the Internal Revenue Code (Appendix, *infra*) by reason of the fact that the corpus consisted of a bank deposit. Section 863(b) provides for the exclusion from the estate of a nonresident alien who was not engaged in business in the United States at the time of his death, of any moneys deposited by or for such alien with any person carrying on the banking business. In substance, the court below held that since the decedent's rights ran against the trustee and since the bank deposit was not *his* at the date of his death,

the exemption provision of Section 863(b) was inapplicable.

This provision first came into the law in Section 403(b)(3) of the Revenue Act of 1921 and it has since been continued without any material change. See Revenue Act of 1924, Sec. 303(e); Revenue Act of 1926, Sec. 303(e); Revenue Act of 1934, Sec. 403(d); Internal Revenue Code, Sec. 863(b), *supra*.

The provision has long been coupled with similar provisions with respect to proceeds of life insurance, and both were enacted in 1921 with the view of attracting foreign capital. See S. Rep. No. 275, 67th Cong., 1st Sess., p. 25 (1939-1 Cum. Bull. (Part 2) 181, 199).[1]

The Court of Appeals was not unmindful of the purpose of the enactment but it took the view (R. 93-94), correctly, we submit, that the section is a

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[1] This report states:

> Section 403(b)3: Under existing law the proceeds of insurance upon the life of a nonresident decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States. A like provision is made respecting moneys deposited with any person carrying on a banking business, by or for a nonresident decedent who is not engaged in business in the United States at the time of his death.

tax exemption to be strictly construed and so construed it is doubtful whether the deposit would have been excludible even if the settlor had reserved an unconditional power to withdraw it from the trust whenever he chose. However, the Court of Appeals found it unnecessary to decide that question, for here there was no unconditional power; the decedent could not revoke without the trustee's consent and the trustee was under a fiduciary duty to consider whether such a revocation would be in the settlor's interests. And the Court of Appeals concluded (R. 95)—

> A deposit so hedged about with restrictions is not properly a bank deposit at all; at least there is no reason to suppose that it is within the scope of Section 863(b).

The decision of the Court of Appeals is believed to be sound and it turns on the peculiar facts presented.

In its petition for certiorari (p. 10) the taxpayer contends that the instant decision is in conflict with *Helvering* v. *City Bank Co.*, 296 U. S. 85, but plainly there is no such conflict. The *City Bank* case did not deal with the estate of a nonresident alien, did not touch the instant problem at all, and does not hold or indicate that a bank deposit such as here involved would be excludible under Section 863(b).

The taxpayer says (Pet. 3-4, 6-7, 12) that the "Instructions" issued by the Treasury Department

which appear on the Estate Tax Return (Form 706) are at variance with our position here. We see no such variance and think that the argument of taxpayer simply begs the question whether a bank deposit like the instant one is within the scope of Section 863(b) in the circumstances of this case. The case of *Farmers' Loan & Trust Co.* v. *Bowers,* 22 F. 2d 464 (S. D. N. Y.), cited by taxpayer (Pet. 6), turns on the peculiar statutory provisions with respect to liberty bonds, and the decision there is not in point here. And see Mim. 5202, 1941-2 Cum. Bull. 241.

Taxpayer cites (Pet. 14) *Brown* v. *Fletcher,* 235 U. S. 589, as authority for the proposition that a trustee holds the trust property for the benefit of the *cestui,* and of course there is no dispute as to this. But it certainly does not follow that the instant deposit is excludible under Section 863(b), for that section *contemplates a direct debtor-creditor relationship between the bank and the alien.* See G. C. M. 22419, 1940-2 Cum. Bull. 288. Here there was no such direct relationship, and as held by the Court of Appeals, a "deposit so hedged about with restrictions is not properly a bank deposit at all." (R. 95.) Taxpayer says (Pet. 15) that the bank deposit was not hedged about by restrictions as between the trustee and the bank. But even if that be so, it would not help taxpayer for it is the relationship between the decedent and the bank that is critical, and here that relationship was too remote to justify the exemption.

CONCLUSION

The decision of the Court of Appeals upon the peculiar facts of this case is correct; there is no conflict; and the petition should be denied.

Respectfully submitted.

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November, 1948.

APPENDIX

Internal Revenue Code:

PART III—ESTATES OF NONRESIDENTS NOT CITIZENS OF THE UNITED STATES

SEC. 860. RATE OF TAX.

A tax equal to the sum of the percentages set forth in section 810 of the value of the net estate (determined as provided in section 861) shall be imposed upon the transfer of the net estate of every decedent nonresident not a citizen of the United States dying after the date of the enactment of this title.

(26 U. S. C. 860.)

SEC. 861. NET ESTATE.

(a) *Deductions Allowed.*—For the purpose of the tax the value of the net estate shall be determined, in the case of a nonresident not a citizen of the United States, by deducting from the value of that part of his gross estate (determined as provided in section 811), which at the time of his death is situated in the United States.—

* * *

(26 U. S. C. 861.)

SEC. 862. PROPERTY WITHIN THE UNITED STATES.

For the purpose of this subchapter—

* * *

(b) *Revocable Transfers and Transfers in Contemplation of Death.*—Any property of which the decedent has made a transfer, by

trust or otherwise, within the meaning of section 811(c) or (d), shall be deemed to be situated in the United States, if so situated either at the time of the transfer, or at the time of the decedent's death.

(26 U. S. C. 862.)

SEC. 863. PROPERTY WITHOUT THE UNITED STATES.

The following items shall not, for the purpose of this subchapter, be deemed property within the United States:

* * *

(b) *Bank Deposits.*—Any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.

(26 U. S. C. 863.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.50. *Situs of property.*—Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespec-

tive of where the certificates thereof are physically located.

Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if consisting of a property right issuing from or enforceable against a resident of the United States or a domestic corporation (public or private), if not subject to the exceptions prescribed in section 863 (a) and (b). Under the provisions of that section the amount receivable as insurance upon the life of a decedent who was a nonresident not a citizen, and moneys deposited by or for such a decedent, who was not engaged in business in the United States at the time of his death, with any person carrying on the banking business, shall not be deemed property within the United States.

Property of which the decedent has made a transfer taxable under the provisions of section 81.15 is deemed to be situated in the United States if so situated either at the time of the transfer or at the time of the decedent's death.

* * *

SEC. 81.51—*Net estate.*—The Internal Revenue Code imposes the tax upon the transfer of only the portion of the estate of a nonresident not a citizen that was situated in the United States. In determining the net estate, the deductions specifically authorized for this class of cases may be taken from the portion of the gross estate situated in the United States.

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